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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

In re CHARLES W. LEWIS, on Habeas Corpus.	A123424 (San Francisco County Super. Ct. No. 5827)

THE COURT:

Petitioner Charles Lewis challenges a decision from the Board of Parole Hearings (Board) finding him not suitable for parole. He contends the Board has violated his right to due process because there was no evidence presented demonstrating that he currently poses a danger to society.

In light of recent, posthearing California Supreme Court decisions that clarified the law regarding parole suitability (*In re Lawrence* (2008) 44 Cal.4th 1181 (*Lawrence*) and *In re Shaputis* (2008) 44 Cal.4th 1241 (*Shaputis*)), we reverse the Board's decision and remand for reconsideration in light of *Lawrence* and *Shaputis*. We do not, however, express any opinion regarding Lewis's suitability for parole.

FACTUAL AND PROCEDURAL BACKGROUND

Lewis was convicted of first degree murder in 1977. He was also convicted of armed robbery that same year in a separate proceeding. He received a sentence of seven years to life in state prison for the crimes.[1]

[1] Lewis was sentenced under the indeterminate sentencing law then in effect.

Lewis has appeared before the Board many times. Twice, in 2001 and 2004, the Board found Lewis suitable for parole. The Governor reversed the Board's decision both times.

Lewis's most recent parole hearing took place in April 2007. Lewis elected not to discuss his life crime at that hearing, but his attorney stated Lewis would "stipulate to the record." The Board then read into the record a description of the robbery and the murder from an Alameda County probation report. According to that report, Lewis robbed a "head shop" in Hayward on September 23, 1976. He had two accomplices, Jeffrey Colbert and Gary Haznos. During the course of the robbery, Lewis pistol-whipped the shop owner and shot him in the shoulder. Lewis took the owner's wallet which contained $1,000. Not long after the robbery, Haznos contacted the police and implicated Lewis and Colbert in the robbery. At 12:15 a.m. on September 26, 1976, Haznos's nude body was found in the parking lot at Candlestick Park. He had been beaten and stabbed. The medical examiner opined that his death resulted from multiple traumatic injuries. Haznos had been seen with Lewis and Colbert the previous afternoon at the home of Lewis's cousin. Witnesses described hearing "tussling," and seeing Lewis and Colbert escorting Haznos from the house.

Lewis had an extensive criminal history before his commission of the life crime.[2] He was on parole when he committed the life crime. A psychosocial assessment prepared for the parole hearing contained the following diagnoses: polysubstance abuse in institutional remission and antisocial personality disorder—much improved. The evaluator, however, concluded that Lewis (as compared to other inmates) represented a low risk of future violence in the community, and that at age 64 he was "different in many ways" from the man who entered prison at age 35.

[2] Lewis had been committed to the California Youth Authority for battery as a juvenile. As an adult, his record included two convictions of bank robbery that led to a federal prison sentence. He had state convictions for statutory rape, robbery, possession of narcotics, and solicitation to commit a felony. He was charged with murder after stabbing a man to death during an altercation at a party. He was acquitted in that case, presumably on the grounds of self-defense.

The Board concluded Lewis was not suitable for parole. Although the Board cited a number of reasons for reaching its decision, the exact interplay of those factors and the weight the Board gave each factor is somewhat unclear. For example, the Board discussed the commitment offense and the related robbery at length in its decision. Yet the Board told Lewis it was "not holding the static factors of that murder against [him]."

The Board discounted the psychosocial assessment, which was generally positive. The Board focused on the evaluator's failure to discuss the robbery, a statement by Lewis during the assessment that he did not participate in the murder, and the diagnosis of antisocial personality disorder—much improved. The Board expressed concern regarding Lewis's insight into his crimes and his remorse. The Board referred to an older psychological assessment, from 2004, in which the evaluator found Lewis's "insights are still somewhat limited." The Board did find Lewis's institutional behavior was a "real positive," and that his age was also a positive factor.[3]

Lewis filed a petition for writ of habeas corpus in the superior court challenging the Board's decision. That petition was denied.

DISCUSSION

"[T]he Penal Code and corresponding regulations establish that the fundamental consideration in parole decisions is public safety." (*Lawrence, supra,* 44 Cal.4th at p. 1205; see Penal Code, § 3041; Cal. Code Regs., tit. 15, §§ 2281, 2402.)[4] The Board has great discretion in parole matters. (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 655.) Nevertheless, "parole applicants in this state have an expectation that they will be granted parole unless the Board finds, in the exercise of its discretion, that they are unsuitable for

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[3] The Board cited Lewis's criminal history and a prior failure on parole as additional negative factors.

[4] All further statutory references are to the Penal Code. All further references to regulations are to title 15 of the California Code of Regulations. In addition, although regulations sections 2281 and 2402 are virtually identical, section 2281 applies here by process of elimination, as section 2402 references persons convicted of murders committed after November 8, 1978. Lewis was convicted of a murder committed in 1977.

parole in light of the circumstances specified by statute and by regulation." (*Id.* at p. 654.)

The parole regulations direct the Board to consider all available relevant and reliable information to determine parole suitability. (Regs., § 2281(b).) The regulations first give general instructions to consider the prisoner's social history, mental state, criminal history, etc. (*ibid.*), and then set forth specific (but nonexclusive) circumstances tending to show suitability or unsuitability for parole (*id.*, subds. (c), (d)). Specific circumstances tending to show unsuitability include a commitment offense committed in an especially heinous, atrocious, or cruel manner; a previous record of violence; an unstable social history; a history of severe mental problems related to the offense; and serious misconduct in prison. (*Id.*, subd.(c)(1), (2), (3), (5), (6).)

Prior to the decision in *Lawrence*, courts upheld parole decisions if some evidence supported the factors cited by the Board in denying parole (including the egregiousness of the offense). (See *Lawrence*, *supra*, 44 Cal.4th at p. 1208.) Other courts, however, concluded "an inquiry that focused only upon the existence of unsuitability factors fail[ed] to provide the meaningful review guaranteed by the due process clause." (*Ibid.*) Instead, those courts examined whether there was some evidence to support a finding the inmate continued to be a threat to public safety. (*Ibid.*)

Lawrence resolved the uncertainty. " '[D]ue consideration' of the specified factors requires more than rote recitation of the relevant factors with no reasoning establishing a rational nexus between those factors and the necessary basis for the ultimate decision—the determination of current dangerousness." (*Lawrence, supra,* 44 Cal.4th at p. 1210.) "Accordingly, when a court reviews a decision of the Board or the Governor, the relevant inquiry is whether some evidence supports the decision of the Board or the Governor that the inmate constitutes a current threat to public safety, and not merely whether some evidence confirms the existence of certain factual findings." (*Id.* at p. 1212, italics omitted; see also *Shaputis, supra*, 44 Cal.4th at p. 1254.)

Here, the Board cited a number of factors in denying parole, but the Board never established a rational nexus between those factors and a finding that Lewis remains a

threat to public safety. In fact the Board never explicitly stated Lewis posed a threat to public safety. The closest the Board came to making such a statement was the vague pronouncement that until "progress is completely made you continue to be unpredictable and a threat to others."

Three of the factors cited by the Board for denying parole—the egregiousness of the commitment offense, Lewis's criminal history, and his prior failure on parole—are indisputably supported by some evidence. But the Board itself conceded these were "static factors that can never be changed." As *Lawrence* states, the aggravated nature of the crime does not in and of itself provide some evidence of current dangerousness to the public. (44 Cal.4th at p. 1214.) Lewis's ancient criminal history and prior failure on parole similarly do not provide evidence of current dangerousness in and of themselves. The Attorney General does not suggest otherwise in defending the Board's decision. Instead the Attorney General focuses on the other factors cited by the Board—lack of insight into the crime, psychological questions, and questionable parole plans. We will examine each of these factors more closely.

Starting with Lewis's parole plans, the record reflects that he had arranged to reside upon release at Allied Fellowship Services, a "live-in residential program" for parolees located in Oakland. A correctional counselor found Lewis's parole plans were "viable and realistic." As recently as Lewis's 2006 parole hearing, the Board indicated approval of the same parole plans. In 2007, however, the Board questioned the propriety of residing in a "halfway house" with other parolees.

Lewis challenges the Attorney General's assertion that the Board relied on his parole plans to deny him parole. In fact we cannot tell whether the 2007 Board panel denied parole, in part, based on perceived inadequacies in Lewis's parole plans. Nevertheless, if the Board did find fault with Lewis's parole plans, it did not explain how the plans imperil public safety. Nothing about the plans readily leads to a conclusion Lewis will fail on parole. If the Board reversed its position on Lewis's parole plans, why it did so is a mystery.

Turning to the psychosocial assessment, the Board stated it was not satisfied with the antisocial personality disorder diagnosis. The Board indicated it wanted to see that disorder "in remission 100%." The Board, however, made no attempt to reconcile its concerns regarding the diagnosis with the remainder of the assessment. Although Lewis made statements to the evaluator that are cause for concern (as discussed below), the overall tenor of the psychological assessment was very positive.[5] In addition, we cannot tell from this record how a diagnosis of antisocial personality "in remission 100%" (assuming such a diagnosis exists) would provide significantly more comfort than the given diagnosis of antisocial personality disorder—much improved. The Board also considered the psychosocial assessment deficient because the evaluator did not discuss the head shop robbery with Lewis. Assuming this is true (the evaluator may have discussed the crime with Lewis but not documented the discussion in his report), we do not understand how this demonstrates Lewis represents a danger to public safety.

With regard to remorse and insight into the crime, the Board appears to have found a lack thereof based on statements Lewis made during the psychosocial assessment, and his failure to issue a clear statement of remorse during the parole hearing. We do believe this to be the critical factor in this case. One of the statements Lewis made to the evaluator, in which he denied participating in the murder, is definitely troubling.

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[5] In addition to concluding that Lewis represented a low risk for future violence in the community, the evaluator stated: "The inmate has done extremely well in prison the past three decades. His programming has been very good. He has significantly matured. He is now 64 years old, and he entered the CDCR at age 35. He is different in many ways from the man who entered the CDCR in 1978. He shows better judgment and much better impulse control. He has never been mentally ill, and he copes well with day-to-day stressors associated with prison life. Although he has a history of substance abuse, he has been active in recovery services in the CDCR, and he cites a strong commitment to sobriety. [¶] Although the inmate's history of substance abuse, personality pathology, and criminal behavior does increase his risk, his positive perspective, age, excellent prison programming, work skills, insight, and commitment to sobriety are positive factors that will increase his chances for a successful transition to the community."

Lewis points out the law does not require him to admit guilt. (See § 5011, subd. (b) [the Board shall not require an admission of guilt when setting a parole date].) But guilt is not the issue here. In 2006 Lewis told a psychological evaluator, " 'I'm as guilty as guilty can be.' " A report from a correctional counselor notes, "As far back as the late 1980's, Inmate Lewis has continued to accept responsibility for the crime."

Similarly, the regulations allow the prisoner to refuse to discuss the facts of the crime. (Regs., § 2236.)[6] Lewis exercised that right at his April 2007 parole hearing. Lewis, however, did allude to the crime during his psychosocial assessment. The evaluator quoted Lewis in his report: " 'I made poor decisions regarding with whom I associated. That was a big mistake. I don't know what happened to the victim, but I am very sorry for his death.' " It is this statement to the evaluator that we find troubling.

This statement goes to the issue of Lewis's remorse and insight into the crime, factors properly before the Board. *Read in isolation* this statement might be interpreted to reflect a lack of insight into the cause of the life crime or Lewis's criminal history, and would suggest that the killing of Haznos was simply the result of associating with the wrong people. So interpreted, this explanation for a brutal murder, which followed a brutal robbery, which followed a prior life of crime, is wholly unsatisfactory.

The murder of Haznos was not an isolated incident in Lewis's life. This distinguishes the instant case from *In re Palermo* (2009) 171 Cal.App.4th 1096. Lewis cites that case for the proposition that a prisoner need not agree with the official version of a crime in order to demonstrate insight and remorse. In *Palermo*, the prisoner shot his girlfriend to death. He was 21 years old at the time of the crime. (*Id.* at p. 1100.) He had no criminal history. (*Id.* at p. 1112.) Although he continued to insist the killing was an

[6] Regs., section 2236 provides: "The facts of the crime shall be discussed with the prisoner to assist in determining the extent of personal culpability. The board shall not require an admission of guilt to any crime for which the prisoner was committed. A prisoner may refuse to discuss the facts of the crime in which instance a decision shall be made based on the other information available and the refusal shall not be held against the prisoner. Written material submitted by the prisoner under s[ection] 2249 relating to personal culpability shall be considered."

accident, the majority of the court in *Palermo* found the prisoner's denial of an intentional killing was not deliberate, dishonest, or irrational. (*Ibid.*) The majority concluded that in light of the prisoner's lack of criminal history, his expression of remorse and acceptance of responsibility, the passage of time and other positive factors, there was no evidence the prisoner posed a danger to public safety. (*Ibid.*; but see *id.* at 1117-1118 (dis. opn. of Nicholson, J.).) Lewis, in contrast, was a 35-year-old career criminal when Haznos was murdered. Now, 30 years later, his insight is arguably limited to a belief that he hung around with the wrong people. (See *Shaputis, supra,* 44 Cal.4th at p. 1260 [record established that although petitioner stated his conduct was wrong and that he felt some remorse, he failed to gain insight or to understand his violent conduct].)

We say arguably because his statement to the evaluator should of course not be read in isolation. Lewis points to other portions of the record which arguably demonstrate more insight and remorse, including statements he made at his 2006 parole hearing. He cites these statements as evidence that he appreciates the magnitude of his prior criminality, has remorse for that criminality, and has accepted responsibility for the harm "it" has caused. At the 2006 hearing Lewis discussed the murder of his own son and the effect it had on him: "I could begin to understand the grief that I had created in the parents of [Haznos] and other victims along the line." Similarly at that hearing, Lewis stated: "I have done some horrible things for which I am deeply sorry for having committed the types of crimes that I have committed."[7] The issue of insight and remorse,

[7] When asked by his attorney at the April 2007 hearing whether there was any question in his mind that he was "sorry for the death of Mr. Haznos," Lewis replied: "No, I wish there was a mirror, a remorse mirror, that you could plug me to and see. I don't know if I'm the most remorseful man on the planet but I think I'm up there somewhere because I do realize what I've done, I really realize what I've done."

however, remains for the Board to resolve. For that reason in particular we reject Lewis's contention that we should simply order his release.[8]

There is some evidence in the present case to support at least some of the factors the Board cited in denying parole. Under *Lawrence, supra,* 44 Cal.4th 1181, however, that determination is not sufficient to uphold the Board's denial of parole. There must be evidence supporting the Board's ultimate conclusion that Lewis remains a threat to public safety. We cannot presume the Board would have reached the same decision in this case had it applied the parole suitability standards articulated in *Lawrence* and *Shaputis*. We therefore believe that the better course under the circumstances of this case is to allow the Board to conduct a new parole hearing in light of *Lawrence* and *Shaputis*. (See *In re Criscione* (2009) 173 Cal.App.4th 60, 78-79; but see *In re Gaul* (2009) 170 Cal.App.4th 20, 41 [directing Board to find prisoner suitable for parole absent misconduct in prison subsequent to the parole hearing under review].) We accordingly reverse the Board's decision and remand the matter to the Board for reconsideration in light of *Lawrence* and *Shaputis*, and also in light of the discussion in this opinion, within 60 days of the finality of this decision. We intimate no opinion about whether the Board ultimately should find Lewis suitable for parole.

[8] Lewis notes that in *Lawrence* the ultimate result on appeal was the release of the prisoner on parole. (See *Lawrence, supra,* 44 Cal.4th at pp. 1201, 1229.) *Lawrence,* however, involved the Governor's reversal of a parole grant. The Supreme Court, finding no evidence to support the Governor's reversal, set aside his decision. (*Id.* at p. 1227.) The effect was to reinstate the Board's decision to grant parole.

DISPOSITION

The Board's decision is reversed. The matter is remanded to the Board for reconsideration in light of *Lawrence*, *Shaputis*, and this decision within 60 days of the finality of this decision.

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Sepulveda, J.

We concur:

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Reardon, Acting P.J.

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Rivera, J.